

Fay's Drug Company, Inc. and United Food and Commercial Workers, District Union Local One, AFL-CIO, Petitioner. Cases 3-RC-7762 and 3-RC-7763

March 25, 1981

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

The National Labor Relations Board has considered objections to an election held October 30, 1980,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.

The Petitioner's objections were filed by Western Union telegram transmitted from New York City at 3:43 p.m., Eastern Standard Time, on November 6, the last day permitted for the filing of objections under Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. The objections were not received in the Regional Office for Region 3 until 9:04 a.m., Eastern Standard Time, on November 7.² Citing *Bechtel Incorporated*,³ the Regional Director observed that the Petitioner had apparently "made a good faith effort to file the objections in timely fashion" and, therefore, treated them as having been timely filed. The Employer filed exceptions, arguing, *inter alia*, that the objections were untimely and that the Regional Director erred in considering them.⁴

We find merit in the Employer's exception. Although we stated in *Bechtel* that "[w]e maintain a distinction . . . between enforcement of our filing deadlines that is strict and enforcement that is draconian,"⁵ we did not thereby abandon all timeliness requirements for the filing of objections to an election. Rather, we reaffirmed in the context of telegraphic filing the guidelines we had previously established for permitting departure from timeliness requirements when objections are filed by mail:

[I]n order to support a variance or deviation from the clear requirements of the Board's Rules, there must be some showing that there has been an honest attempt to substantially

comply with the requirements of the Rules, or, alternatively, a valid and compelling reason why compliance was not possible within the time required by the Rules.⁶

In *Bechtel* several factors supported variance from the timeliness requirements. The petitioner was obliged to investigate preelection conduct at 15 locations; a 2-hour time difference existed between Alaska, where the elections were held, and Seattle, Washington, where objections were to be filed, and the petitioner therefore had fewer than 5 full days in which to lodge objections with the Board; and the telegram was sent almost 3-1/2 hours before closing time at the Regional Office. Moreover, before sending the telegram, the petitioner's attorney informed the Board agent and the employer's attorneys by telephone of the nature of the objections; and, when the petitioner's attorney learned that the Regional Office was likely to close before the telegram could be delivered, he called a Seattle reporting service and dictated the objections for delivery to the Regional Office. Under those circumstances, the Board relieved the petitioner of the consequences of its untimely filing, noting particularly that, in the interim, the Board had opened a resident office in Alaska in order to alleviate the inadequacy and inconvenience caused by serving the Alaska area solely from Seattle.

In the case before us, the Petitioner has advanced no valid and compelling reason for its lateness in filing objections,⁷ nor can we on the record before us interpret its sending a telegram less than 1-1/2 hours before the Regional Office closed as an honest attempt at substantial compliance with our filing requirements.⁸

Accordingly, as objections have not been timely filed in accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, and, as the tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for United Food and Commercial Workers, District Union Local One, AFL-CIO, and that said labor organization is not

¹ The election was conducted pursuant to a Decision and Direction of Second Election issued by the Board on September 26, 1980. The tally was 33 for and 47 against the Petitioner; there were 2 challenged ballots, an insufficient number to affect the results.

All dates are in 1980 unless otherwise indicated.

² The Regional Office is open from 8:30 a.m. until 5 p.m.

³ 218 NLRB 827 (1975).

⁴ The Employer has requested oral argument *inter alia*, on the issue of timeliness. The request is hereby denied as the record, the exceptions, and the brief adequately presented the issue and the positions of the parties.

⁵ *Bechtel Incorporated*, *supra* at 827.

⁶ *Id.* at 828, quoting *Alfred Nickles Bakery, Inc.*, 209 NLRB 1058, 1059 (1974).

⁷ The Petitioner has, in fact, advanced no justification whatsoever.

⁸ As we noted in *Sig Wold Storage & Transfer, Inc.*, 205 NLRB 378 (1973), under almost identical circumstances, the Petitioner could not reasonably have expected the telegram to be delivered on time. See *Hughes Tool Company d/b/a KLAS-TV*, 197 NLRB 1160 (1972).

the exclusive representative of all the employees in the unit herein involved, within the meaning of

Section 9(a) of the National Labor Relations Act, as amended.